HON HO WAH & ANOR.

v.

UNITED MALAYAN BANKING CORPORATION BERHAD

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM, DATO' PEH SWEE CHIN, DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJJ
[CIVIL APPEAL NO. 02-317-1992]
12 MAY 1994

LAND LAW: Appellants purchasing property from developer - Bank taking judgment against developer on default of banking facilities granted - Bank obtaining prohibitory order against the properties purchased by the appellants pending their sale to realise the judgment debt - Appellants applying to intervene in the proceedings between the Bank and the developer and for setting aside of the prohibitory order - Consideration of s. 334 National Land Code 1965 - Whether grant of prohibitory order proper - Whether developer had an interest in the properties purchased by the appellants - Appeal against decision of High Court dismissing the appellants application.

The appellants purchased two apartments from the developer who had been granted banking facilities by the bank. On default by the developer the bank had applied for an order for sale of the properties charged to it and had filed a civil claim on which they obtained judgment. The order for sale of the apartments purchased by the appellants was settled out of Court by way of payment made by the landowner on 29 July 1991 and the appellants, who had signed the sale and purchase agreements on 2 & 3 August 1991 respectively, paid the balance of the purchase price by 9 August 1991.

On 14 August 1991, the bank was granted a prohibitory order over the apartments purchased by the appellants pending their sale to realise the judgment debt of RM763,409.21 which order was registered in the Registry of Titles on 21 August 1991. The discharge of charge of the apartments purchased by the appellants was registered on 23 August 1991.

The appellants application to intervene in the proceedings and for setting aside the prohibitory order on the grounds that as equitable owners of the two apartments they have priority as against the said prohibitory order was dismissed with costs. The appellants appealed further.

Held:

[1] As the bank had been paid in full the outstanding sums due under the charge, it follows that the bank, as chargee, ceased to have any legal interest in the lands on 29 July 1991, the date of payment. On that date the beneficial interest in the land had passed to the developer who executed the sale and purchase agreements with the appellants.

[2] The landowner having disclaimed any proprietory interest in respect of the two apartments, the subject-matter of this appeal, the developer held the interest in the two apartments as bare trustees of the appellants upon receipt of the full purchase price.

[3] In the circumstances the developer did not hold any interest in the land on the date of the grant of the prohibitory order and as the requirements of s. 334 of the National Land Code 1965 had not been complied with, the prohibitory order should not have been granted and the appellants had every right to intervene in the proceedings.

[Appeal allowed with costs. Prohibitory order set aside].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG TANAH: Perayu membeli harta daripada pemaju - Bank mengambil penghakiman terhadap pemaju atas kemungkiran kemudahan perbankan yang diberikan - Bank mendapatkan perintah larangan terhadap harta yang dibeli oleh perayu sementara menunggu penjualannya untuk melangsaikan hutang penghakiman - Perayu memohon untuk mencelah dalam prosiding di antara Bank dan pemaju dan untuk mengenepikan perintah larangan tersebut - Pertimbangan s. 334 Kanun Tanah Negara 1956 - Sama ada pemberian perintah larangan itu patut - Sama ada pemaju mempunyai kepentingan dalam harta yang dibeli oleh perayu - Rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu.

Perayu telah membeli dua buah apatmen daripada pemaju di mana pihak bank telah memberikan kemudahan perbankan kepada pemaju tersebut. Atas kemungkiran oleh pemaju, pihak Bank telah memohon untuk

mendapatkan perintah bagi menjual harta-harta yang dicagarkan kepadanya dan pihak Bank telah memfailkan tuntutan sivil di mana mereka telah memperolehi penghakiman. Perintah menjual harta-harta yang dibeli oleh perayu-perayu tersebut telah diselesaikan di luar Mahkamah melalui pembayaran yang dibuat oleh tuantanah pada 29 Julai 1991 dan para perayu yang telah menandatangani surat perjanjian jual-beli masing-masing pada 2 dan 3 Ogos 1991, telah membayar baki harga belian sebelum 9 Ogos 1991.

Pada 14 Ogos 1991, Bank telah memperolehi suatu perintah larangan ke atas apatmen-apatmen yang dibeli oleh para perayu sementara menunggu penjualannya untuk melangsaikan hutang penghakiman yang berjumlah RM763,409.21 di mana perintah tersebut telah didaftarkan dalam Pejabat Pendaftaran Hakmilik pada 21 Ogos 1991. Pelepasan gadaian akan apatmen-apatmen yang dibeli oleh para perayu tersebut telah didaftarkan pada 23 Ogos 1991.

Permohonan oleh para perayu untuk mencelah dalam prosiding dan bagi mengenepikan perintah larangan atas alasan bahawa sebagai pemilik saksama akan dua buah apatmen mereka mempunyai keutamaan berbanding dengan perintah larangan tersebut telah ditolak dengan kos. Para perayu telah membuat rayuan lanjutan.

Diputuskan:

[1] Memandangkan jumlah wang yang tertunggak di bawah cagaran tersebut telah dibayar dengan penuhnya kepada pihak Bank, maka Bank sebagai pemegang gadaian mestilah terhenti daripada mempunyai sebarang kepentingan di sisi undang-undang ke atas tanah-tanah berkenaan pada 29 Julai 1991, iaitu tarikh pembayaran. Pada tarikh tersebut kepentingan benefisial ke atas tanah-tanah berkenaan telah diberikan kepada pemaju yang menandatangani surat perjanjian jual-beli dengan para perayu.

[2] Oleh kerana tuantanah tidak menuntut sebarang kepentingan keempunyaan berhubung dengan kedua-dua buah apatmen tersebut, iaitu hal-perkara rayuan ini, maka pemaju yang mempunyai kepentingan ke atas kedua-dua buah apatmen berkenaan sebagai pemegang amanah bare akan para perayu atas penerimaan harga belian yang penuh.

[3] Dalam hal ini, pemaju tersebut tidak mempunyai sebarang kepentingan ke atas tanah berkenaan pada tarikh perintah larangan tersebut diberikan dan oleh kerana peraturan s. 334 Kanun Tanah Negara 1965 tidak dipatuhi, perintah larangan tersebut seharusnya tidak patut diberikan dan para perayu mempunyai hak untuk mencelah dalam prosiding.

[Rayuan dibenarkan dengan kos. Perintah larangan diketepikan].

Cases referred to:

Chua Hee Hung & Ors. v. QBE Supreme Insurance Bhd. [1990] 1 MLJ 480 ***(foll)***

Temenggong Securities Ltd. & Ors. v. Registrar of Titles, Johor & Ors. [1974] 2 MLJ 45 ***(foll)***

Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 ***(foll)***

Teh Bee v. K. Maruthamuthu [1977] 2 MLJ 12 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 206(3), 256, 334

For the appellants - Darshan Singh Khaira; M/s. Teja Singh & Co.

For the respondent - Hira Singh; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Harun bin Mahmud Hashim SCJ:

In 1983, the plaintiff (Bank) granted to the defendant (Developer) banking facilities exceeding RM1 million which were secured by legal charges over two properties known as the Anson Apartments and No: 30 Rose Avenue, both in Georgetown, Pulau Pinang.

Upon default, the Bank applied for an order for sale of the two properties under s. 256 of the National Land Code 1965. At the same time, the Bank also filed a civil claim for recovery of the amount owing under the account secured by the Rose Avenue property. On 8 May 1991 they obtained judgment for RM763,409.21 with further interests and costs.

The order for sale of the Anson Apartments was settled out of Court on 29 July 1991. There are 31 units of apartments built by the Developer on this property. On 2 August 1991, Toto Wiguna purchased Apartment No: 160/7-2 and on 3 August 1991, Hon Ho Wah purchased Apartment No: 160/4-3. They executed sale and purchase agreements and paid 10% of the purchase price. On 8 and 9 August 1991 the purchasers

paid the Developer the balance of the full purchase price of RM250,000 and RM240,000 respectively.

On 14 August 1991, the Bank was granted a prohibitory order over the two apartments purchased by Hon and Toto pending their sale to realise the judgment debt of RM763,409.21. The said prohibitory order was registered in the Registry of Titles Pulau Pinang on 21 August 1991 followed by the registration of the discharge of charge of the Anson Apartments on 23 August 1991.

On 29 November 1991, Hon and Toto filed an application to intervene in the proceedings and for setting aside the prohibitory order on the ground that as equitable owners of the two apartments they have priority as against the said prohibitory order. On 30 June 1992, the learned Judge dismissed the interveners' application with costs. Hence this appeal.

The Anson Apartments were built on lands owned by the Evangelical Lutheran Church in Malaysia and Singapore (the Church). On 23 March 1981 the Church entered into a principal joint venture agreement with the Developer to build the 31 units of apartments on the lands. This was followed by a supplemental agreement on 26 April 1983. The Church, as registered owners of the lands, executed third party charges on 29 March 1985 and 20 September 1985 respectively to the Bank to finance the Developer. These were the charges the subject-matter of foreclosure proceedings between the Bank and the Church in Penang High Court O.S. No: 24-308-1989 which was settled out of Court on 29 July 1991. By letter dated 1 August 1991 the Church wrote to the Developer as follows:

> Dear Sirs,
>
> Re: Land held as security for UMBC A/C No. 2535073532 namely lands held under lot 56, 1212, 1213, 1214 & 1215 Bandar George Town, DTL, Penang.
>
> We refer to the above matter.
>
> We write to inform you that we have paid a sum of RM1,525,046.80 on 29 July 1991 to UMBC being a full and final payment to redeem the above properties charged to the said UMBC.
>
> Yours faithfully,
>
> Sgd.
> (Julius D. Paul)
> Bishop.
>
> Encl. (1) Letter of acknowledgment of Asbir, Hira Singh & Co.
> (2) Banking Slip.

By another letter of the same date, the Bishop wrote to the Developer as follows:

> Dear Sirs,
>
> Re: Letter of Disclaimer/Waive of Proprietary Interest
>
> We write to irrevocably confirm that our Church being the landowners of Lot No. 002125 Sek. 12, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Grant No. 18852 (formerly known as Lots 56, 1212, 1213, 1214 and 1215, Sek. 12 Bandar Georgetown, Daerah Timur Laut, Pulau Pinang) on which the apartment block known as Anson Apartments at Anson Road, Penang is built, we do not have any proprietary interest on the following Apartments:
>
> (a) Unit No. 160/4-3
> (b) Unit No. 160/7-2
>
> This letter of confirmation is pursuant to the Settlement Agreement dated 1 August 1991 between your company and our Church.
>
> Yours faithfully,
>
> Sgd.
> (Julius D. Paul)
> Bishop.

It will be observed from these two letters that:

(a) the Bank has been paid in full the outstanding sums due under the Charge on 29 July 1991; and
(b) the Church disclaimed any proprietary interest in respect of the two apartments, the subject-matter of this appeal.

It follows that the Bank, as Chargee, ceased to have any legal interest in the lands on 29 July 1991. On that date, the beneficial interest in the land had passed to the Developer, who on 2 August 1991 and 3 August 1991 executed the sale and purchase agreements with the appellants respectively. The appellants paid the full purchase price on 8 and 9 August 1991 and from then on the Developer held the interest in the two apartments as bare trustees of the appellants: see *Chua Hee Hung & Ors. v. QBE Supreme Insurance Bhd.* [1990] 1 MLJ 480 @ 483 SC where it was held, following *Temenggong Securities Ltd. & Ors. v. Registrar of Titles, Johor & Ors.* [1974] 2 MLJ 45 FC, that the vendors, after receipt of the full purchase price

and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers. *Temenggong Securities* in turn followed *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 FC. In the present case, the appellants had entered into possession of the two apartments before the purchase. It is true that under the Torrens System, the register is everything: *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ FC @ 12 but only *prima facie.* Here the appellants were aware of the charge but before executing the sale and purchase agreements, they were shown by the Developer the bankslips of payment to the Bank and the two letters from the Bishop. On top of that, section 2.02 of the sale and purchase agreement making reference to a charge of the land to a bank was deleted and signed by both parties. The delay in presenting the discharge of charge for registration until 23 August 1991 does not therefore affect the equitable rights of the appellants.

The prohibitory order obtained by the Bank on the two Anson Apartments was on the basis that they had obtained judgment against the Developer in the sum of RM763,409.21 with further interest and costs and that the judgment-debtor held an interest in land. A prohibitory order under s. 334 of the National Land Code is limited to cases:

> where land or an interest in land held by a judgment-debtor is to be sold in execution proceedings.

Here the Developer is a judgment-debtor and the Bank had filed in Court an application for an order for sale in respect of the two apartments on 21 November 1991 in execution proceedings but the Developer, for the reasons we have stated, did not hold any interest in land in respect of the said apartments on 14 August 1991. As was said in *Karuppiah* at p. 118:

> Want of registration cannot affect his (the purchaser's) equitable rights. Section 206 of the National Land Code, which provides for registration of instruments of dealing in land, contains an express proviso in sub-section (3) that "nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein". It is trite law that when the Court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

We hold that the prohibitory order should not have been granted in the instant case as the requirements of s. 334 of the National Land Code have not been complied with. In our judgment, the appellants had every right to intervene in the proceedings.

We accordingly allow the appeal with costs here and below. The order of the High Court dated 30 June 1992 and the prohibitory order dated 14 August 1991 are hereby set aside. The deposit and the security for costs be refunded to the appellants.